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No. 532

In the Supreme Court of the United States

OCTOBER TERM, 1968

DARLINGTON-HARTSVILLE COCA-COLA BOTTLING COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners are bottlers of Coca-Cola. Prior to January 8, 1964, they obtained Coca-Cola syrup through Crosswell under contracts fixing the price to them at specified amounts per gallon above the Coca-Cola Company's price to Crosswell. On January 8, 1964, they made certain payments required to eliminate Crosswell and to achieve the right, in perpetuity, to purchase the syrup directly from the Coca-Cola Company at the lesser price paid by Crosswell. (Pet. App. 21–22). The sole question in these cases is whether those payments are expenditures that must be capitalized, as the courts below found, or are currently de-

323-605—68

ductible ordinary and necessary business expenses, as petitioners contend.

The decision below is correct. There is no conflict of decisions or any other reason for further review.

1. It is elementary that an expenditure for which the taxpayer obtains an asset that will never be consumed in the business, or will be consumed only gradually over a period of years, may not be the subject of a current deduction. See, *e.g.*, *Commissioner* v. *Boston Elevated Ry. Co.*, 196 F. 2d 923 (C.A. 1); *Cotlow* v. *Commissioner*, 228 F. 2d 186 (C.A. 2); *Commissioner* v. *Indiana Broadcasting Corp.*, 350 F. 2d 580 (C.A. 7), certiorari denied, 382 U.S. 1027; see, generally, 4A Mertens, Law of Federal Income Taxation (1966 Rev.), Section 25.20. The sole purpose of the outlay at issue here was to acquire the contractual right formerly held by Crosswell to buy Coca-Cola syrup for the low price available only to the primary franchise holder. Petitioners do not challenge the ruling that the right was (Pet. 20) of "indefinite duration." Consequently the deduction was properly denied.

2. The cases petitioner asserts (Pet. 6–9) to be in conflict with the decision here represent several lines of authority, each, on its facts, resolving in favor of a taxpayer a close question of deductibility, and none involving facts or analysis that might offer a fair precedent for resolving the present case.[1] Thus, *E. H. Sheldon & Co.* v. *Commissioner*, 214 F. 2d 655 (C.A. 6), dealing with the cost of printing a sales catalog that would be used for more than one year, and

[1] This is true also of the seven examples cited on p. 5 of the petition.

Perkins Bros. v. *Commissioner,* 78 F. 2d 152 (C.A. 8), where the issue was the tax treatment of such costs as those of a contest, incurred to build up a newspaper's circulation, have to do with the problem of advertising expenses and accord in their result with other like cases. See the authorities cited in *Sheldon,* 214 F. 2d at 659; compare Rev. Rul. 68–561, 1968–43 I.R.B. 10.

Cravens v. *Commissioner,* 272 F. 2d 895 (C.A. 10), is somewhat closer to the present case, in that the issue concerned an expense incurred in one year to assure the delivery of cattle feed during the following two taxable years. But the decision allowing a current deduction rests on an unusual set of facts: because a severe drought had forced the taxpayers to choose between (272 F. 2d at 899) "disposing of at least part of his herd or arranging for feed," the case was thought to present the type of extraordinary expenditure designed to preserve "the safety of a business", *Welch* v. *Helvering,* 290 U.S. 111, 114, which has been treated as a current item. See, also, *Kornhauser* v. *United States,* 276 U.S. 145.

Stuart Co. v. *Commissioner,* decided June 30, 1950 (9 T.C.M. 585 (C.C.H.), affirmed, 195 F. 2d 176 (C.A. 9); *Pressed Steel Car Co.* v. *Commissioner,* 20 T.C. 198; *Metropolitan Co.* v. *United States,* 176 F. Supp. 195 (S.D. Ohio); and *Montana Power Co.* v. *United States,* 145 Ct. Cl. 611, 171 F. Supp. 943, deal with the so-called "onerous contract" and hold that payments made to secure relief from contractual obligations are currently deductible. Those cases, however, did not purport to allow a current deduction to any

taxpayer in the face of the established fact as here that it had acquired, in exchange for the payment, a new and valuable asset which would serve its income producing interests in future years. Indeed, in those cases, the Government never asserted the theory that a release from a contract constituted asset of continuing value.

Millinery Corp. v. *Commissioner,* 350 U.S. 456, illustrates the distinction, and controls this case. There a lessee purchased the fee, thus obtaining use of the property free of the prior lease obligations. The lessee then claimed an immediate deduction of the amount by which the purchase price exceeded the value of the land without the improvements on the theory (*id.* at 459) that the amount was allocable to the elimination of the alleged "onerous lease." This Court, however, required the taxpayer to capitalize the entire expenditure because (*id.* at 461) it "acquired two assets—land and a building—whose use it will have for the remainder of their useful lives * * *."[2] The same is true of the rights petitioners acquired to purchase Coca-Cola syrup, and a decision could not be rendered in their favor so long as *Millinery* stands.[3]

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[2] *Denholm & McCay Co.*, 2 B.T.A. 444, Acq. IV-2 Cum. Bul. 2 (1925), and *Cleveland-Allerton Hotel* v. *Commissioner*, 166 F. 2d 805 (C.A. 6) (see Pet. 9), have been overruled by *Millinery*. See 350 U.S. at 458–459.

[3] *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, does not (see Pet. 10) bear on this case. The issue there was whether the gains realized on the sale of futures contracts were capital or ordinary, where the contracts had been acquired to insure a source of raw materials. There was no claim that the cost of acquiring the futures was deductible when incurred. Even if petitioner's contractual right to purchase Coca-Cola syrup was

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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not a capital item, it would not follow that the cost at issue here could be deducted, for, whatever the nature of the item, a current deduction is unavailable if the property remains useful over a number of years. Compare, *e.g.*, the treatment of depreciable assets (Section 1221(2) of the 1954 Code) used in the trade or business, which are not capital, but must be depreciated. Cf. *Tulane Hardwood Lumber Co.* v. *Commissioner*, 24 T.C. 1146; *Journal Co.* v. *United States*, 195 F. Supp. 434 (E.D. Wis.).

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